Sup

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No. 02-1764

IN THE

Supreme Court of the United States

SOB, INC., A MINNESOTA CORPORATION, d/b/a SUGAR DADDY'S; AMY CHENOWETH; SHANNON WIBORG; KATHRYN HASKINS; MARK VAN GELDER; and MARY CLIFFORD VAN GELDER,

Petitioners,

v.

COUNTY OF BENTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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INTRODUCTION

The Respondent County of Benton (hereinafter "County") submits this Supplemental Brief pursuant to Rule 15.8 of the Supreme Court Rules to address a new decision which was issued by the Eleventh Circuit Court of Appeals after the County submitted its Brief in Opposition to Petitioners' Petition for Writ of Certiorari.

ARGUMENT

THE EIGHTH CIRCUIT'S DECISION UPHOLDING THE VALIDITY OF THE COUNTY'S PUBLIC NUDITY ORDINANCE IS NOT IN CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN THE *PEEK-A-BOO LOUNGE* CASE.

Petitioners have asserted that the case of *Peek-A-Boo Lounge of Bradenton v. Manatee County, Fl.*, 337 F.3d 1251 (11th Cir. July 15, 2003) creates a conflict between the Eighth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals in regard to how much evidence is sufficient to cast doubt on a municipality's rationale for a public nudity ordinance. Petitioners argue the Supreme Court must resolve the conflict.

Contrary to Petitioners' arguments, however, the *Peek-A-Boo Lounge* case does not create a conflict between the Eighth and Eleventh Circuits. Rather, the Eleventh Circuit reached a different result than the Eighth Circuit based on the evidence introduced in the *Peek-A-Boo Lounge* case. Both courts applied the same standard and simply reached different results based on the evidence in each case. Such a situation does not create a conflict between the circuits.

In the *Peek-A-Boo Lounge* case, the Eleventh Circuit concluded that the adult entertainment businesses had cast direct doubt on the county's rationale for the public nudity ordinance. In this case, the Eighth Circuit concluded that Petitioners failed to cast sufficient doubt on the County's rationale for the Ordinance. *See* Pet. at A17 ("Sugar Daddy's failed to cast sufficient doubt on the County's rationale for the Ordinance").[1] Petitioners have asserted that the Eleventh Circuit in the *Peek-A-Boo Lounge* case "reaches absolutely the opposite conclusion of the Eighth Circuit in the instant case, when, confronted with essentially indistinguishable evidence as to the absence of secondary effects." Reply Br. at 4.[2] Contrary to Petitioners' assertion, however, the evidence introduced by the adult entertainment businesses in the *Peek-A-Boo Lounge* case is easily distinguishable from the evidence introduced in this case.

In the *Peek-A-Boo Lounge* case, the adult entertainment businesses introduced two *volumes* of evidence disputing the county's evidence which included (1) satisfactory health and safety inspection reports of the businesses by the state department of health and the fire department, (2) incident reports of criminal activity near the adult entertainment businesses and elsewhere showing lower crime rates near the adult entertainment businesses than in surrounding areas, (3) recent sales and assessment data revealing an increase in property values for property located near the adult entertainment businesses, and (4) an award to the adult entertainment business by the sheriff for its "outstanding

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1. Citations to "Pet." are to Petitioners' Petition for Writ of Certiorari.

2. Citations to "Reply Br." are to Petitioners' Reply Brief in Support of the Petition.

contribution to the community." 337 F.3d at 1270. Most importantly, however, the adult entertainment businesses also introduced three expert studies that specifically addressed local conditions in the county which purported to show that there was no evidence connecting their businesses with negative secondary effects. *Id.* at 1270-71.

In comparison to the *Peek-A-Boo Lounge* case, the evidence submitted by Petitioners in this case is limited to the self-serving Affidavit of the owner of the adult entertainment business, Mark Van Gelder, some property information submitted by Mr. Van Gelder, and two papers written by Paul, Linz and Shafer. Contrary to the *Peek-A-Boo Lounge* case, Petitioners in this case did not introduce satisfactory health and safety inspection reports of the adult entertainment businesses or any awards to the businesses for "outstanding contribution to the community." Most importantly, there are no local studies in this case which address the negative secondary effects associated with the adult entertainment business or the lack thereof.

In the *Peek-A-Boo Lounge* case, besides introducing recent sales and assessment data revealing an increase in property values for property located near the adult entertainment businesses, the businesses also introduced an extensive "Market Study and Report" by a licensed real estate agent. 337 F.3d at 1271. The study analyzed the effects of the adult entertainment businesses on neighboring properties. *Id.* The study concluded that there were "no signs of any negative effects on adjoining property values or conditions" resulting from the businesses. *Id.*

In comparison, in the present case, Petitioners introduced a property analysis that Mr. Van Gelder had prepared.

As thoroughly discussed in the County's Brief in Opposition, the County submitted an Affidavit from the County Assessor explaining why Mr. Van Gelder's analysis was misleading and did not establish anything regarding the effect a certain type of business may have on nearby property values. *See* Br. Opp'n at 9-12. Unlike the information submitted in the *Peek-A-Boo Lounge* case, many of the entries in Mr. Van Gelder's submissions did not reflect any recent sales and the sales that were reflected showed an incorrect percentage increase in value. *See* Br. Opp'n at 10-11.

In the *Peek-A-Boo Lounge* case, besides introducing incident reports of criminal activity showing lower crime rates near the adult entertainment businesses than in surrounding areas, the businesses also introduced an expert study by Dr. Terry A. Danner, Chair of the Department of Criminology at St. Leo University. *Id.* Dr. Danner conducted a study using the county's own crime statistics and concluded that the adult entertainment businesses did not cause an increase in crime. *Id.*

Unlike the *Peek-A-Boo Lounge* case, Petitioners in this case did not introduce incident reports of criminal activity near the adult entertainment businesses and elsewhere showing lower crime rates near the businesses than in surrounding areas. Rather, Petitioners simply introduced Mr. Van Gelder's self-serving Affidavit. Petitioners did not conduct a local study to determine the effect adult entertainment businesses have had on local crime rates in the County. Rather, Petitioners selectively chose two local businesses and compared the police calls to those businesses with the police calls to the two adult entertainment businesses. Mr. Van Gelder's Affidavit does not explain where the two local businesses he selected for comparison

purposes are located in relation to the adult entertainment businesses. Mr. Van Gelder's Affidavit does not establish that there are lower crime rates near the adult entertainment businesses than in surrounding areas. *See* Pet. App. at A80-A81. As thoroughly discussed in the County's Brief in Opposition, Mr. Van Gelder's Affidavit does not cast legitimate doubt on the County's conclusion that adult entertainment businesses cause adverse secondary effects. *See* Br. Opp'n at 8-9.

Finally, the only other evidence submitted by Petitioners is two articles written by Paul, Linz and Shafer. Petitioners claim that these articles cast doubt on the validity of the studies relied upon by the County in enacting the Ordinance. As explained in the County's Brief in Opposition, the Paul, Linz and Shafer papers are clearly insufficient to cast legitimate doubt on the County's rationale for the Ordinance. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000), this Court specifically stated it did not view the Paul, Linz and Shafer article as sufficient to cast doubt on the city's rationale for the ordinance. *See* Br. Opp'n at 7.[3]

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3. In addition, when courts have addressed the problem of conflicting proof, they have unequivocally stated that the power to weigh the credibility of evidence lies with the municipality and not the courts. It is the role of the County Board to determine which evidence to rely upon and how much evidence is enough to require action in redressing a perceived problem. *See generally Threesome Entertainment v. Strittmather*, 4 F.Supp.2d 710, 719 (N.D. Ohio 1998) (explaining that city's choice of whether it should rely upon one report over another was fully within city's legislative discretion and that court need only conclude that reasonable legislature would have enacted challenged ordinance); *SDJ v. City of Houston*, 636 F. Supp. 1359, 1367 (S.D. Tex. 1986), *aff'd* 837 F.2d 1268 (5th Cir. 1988) (explaining that fact that other experts hold conflicting opinions on

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A comparison of this case to the *Peek-A-Boo Lounge* case clearly shows that the evidence introduced in the two cases is substantially different. Whereas in the *Peek-A-Boo Lounge* case, the Eleventh Circuit determined that the adult entertainment businesses had successfully cast doubt on the county's rationale for the public nudity ordinance by placing into the record substantial and unanswered factual challenges to the county's findings, in this case, the Eighth Circuit correctly found that Petitioners had not produced evidence to cast sufficient doubt on Benton County's rationale for the public nudity ordinance. The *Peek-A-Boo Lounge* case does not demonstrate a split in the circuits. Rather, the *Peek-A-Boo Lounge* case simply shows how each case regarding a public nudity ordinance must be analyzed on its own facts and evidence. Decisions that reach different results based on different evidence do not create a conflict in the circuit courts. This Court should deny the petition.

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effects of sexually oriented businesses on property values is irrelevant to court's First Amendment inquiry); *N.W. Enterprises v. City of Houston*, 27 F.Supp.2d 754, 801 (S.D. Tex. 1999) (explaining that "[i]t is not this Court's role to weigh competing evidence on factual issues").

CONCLUSION

For the foregoing reasons, as well as those set forth in the County's Brief in Opposition, the petition should be denied.

Respectfully submitted,

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